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NO. 84-1308

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1984

FREEMAN (TEEK) BOSLEY, JR., Clerk of the Circuit Court, City of St. Louis, and PAULA CARTER, Deputy Circuit Clerk, City of St. Louis,

Petitioners,

v.

SHIRLEY BARNES, FRANCES J. McELROY, and MURRELL THOMAS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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28 pp

QUESTIONS PRESENTED

POINT I

WHETHER PETITIONER'S CONTENTION THAT FIRING COMPETENT EMPLOYEES SOLELY BECAUSE OF THE MANNER IN WHICH THEY EXERCISED THEIR RIGHTS OF ASSOCIATION IS PERMISSIBLE IN CERTAIN CIRCUMSTANCES.

POINT II

WHETHER A DISCHARGED PUBLIC EMPLOYEE MUST PROVE THAT HE WAS FIRED SOLELY BECAUSE OF HIS POLITICAL AFFILIATION OR WHETHER PROVING THAT HIS POLITICAL AFFILIATION WAS A SUBSTANTIAL MOTIVATING FACTOR IS SUFFICIENT.

POINT III

WHETHER THE BALANCING REQUIRED BY THE OPINION IN PICKERING V. BOARD OF EDUCATION, 391 U.S. 563 (1968) IS APPLICABLE PRIMARILY TO FREE SPEECH CASES, OR WHETHER IT IS APPLICABLE TO A CASE SUCH

AS THIS, WHICH CONCERNS A FIRING OF COMPETENT PUBLIC EMPLOYEES WHICH WAS MOTIVATED SOLELY BY THE MANNER IN WHICH THE EMPLOYEES EXERCISED THEIR RIGHT OF ASSOCIATION.

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STATEMENT OF THE CASE

Petitioners' statement of the case does not constitute a truthful, clear, definite and complete disclosure concerning the controversy before the Court. Petitioners instead are attempt-

ing to re-argue the evidence which they presented at trial. The only facts properly before this Court are those ultimate findings which have been affirmed by the Eighth Circuit. Pertinent excerpts of the Appelate Court's findings in Barnes v. Bosley, 745 F.2d 501 (8th Cir. 1984) follow:

> Upon reviewing the evidence introduced at trial, we are convinced the trial court did not clearly err in its finding that political motives prompted the plaintiffs' dismissals. The court cited the following factors to support its finding: (1) the plaintiffs were discharged three days after Bosley was sworn in; (2) Bosley wrote to a judge on the circuit court regarding the discharge of the plaintiffs (although they were unnamed in the letter) before they were interviewed by the transition team; (3) the transition team interviews with Barnes and McElroy did not touch to any significant extent upon the plaintiffs' qualifications or job history; (4) the plaintiffs were close political affiliates of Roddy; (5) the termination letter stated the plaintiffs were being terminated from "policymaking and/or nonconfidential position[s];"

and (6) Bosley made public statements to the effect that he had the desire and right to bring his own team into the clerk's office. Barnes v. Bosley, 568 F.Supp. 1406, 1410 (E.D.Mo. 1983).

The defendants dispute the significance of these factors, maintaining that Bosley fired the plaintiffs because he thought his own management team was better qualified and could do a better job. They point out that the transition team interviewed over forty employees in the Clerk's Office including Barnes and McElroy and studied the operations of the office. In addition, several former Roddy supporters still hold jobs in the Clerk's Office and have not been pressured to change their party allegiances.

[4] We nonetheless believe that the evidence is sufficient to uphold the district court's finding. It is evident from the record that Bosley and his transition team gave the plaintiffs' qualifications cursory treatment. The transition team questionnaires for Barnes and McElroy show only a few questions were asked. The team did not interview Thomas at all. Bosley talked to the plaintiffs on January 3 and asked them to submit resumes, but fired them on January 4 before they could submit them. Furthermore, the district court found the plaintiffs were competent in their positions, citing their many years of satisfactory service accompanied

> by a substantial number of promotions. The court also found the plaintiffs had sufficient education to perform the duties of their respective positions.

Barnes, supra at 506-507.

Additionally, the transition team members (all of whom were opposed to the candidate with whom plaintiffs were affiliated) were appointed by Bosley to the positions previously held by plaintiffs. Barnes, supra at 504.

> In weighing the defendants' evidence, the district court looked at the plaintiff's long years of satisfactory service and the type of skills required by their jobs. The court concluded that the plaintiffs were in fact experienced and competent employees and that they would not have been discharged if they had not been longtime political supporters of the previous clerk. In our view, this finding is not clearly erroneous. . . . we believe the district court did not err in finding the plaintiffs' political affiliation was not important to the positions they held. Like the public defenders in Branti and the football coach in the Court's example in that case, these plaintiffs' political viewpoints would not in-

fluence policymaking in the areas within their discretion. Because the plaintiffs proved the two elements essential to their cases, we affirm the district court's judgment in favor of Barnes and McElroy.

[9] For the same reason, we reverse the district court's judgment against Thomas. The only factor distinguishing Thomas's case from the cases of the other two plaintiffs is that he was transferred to a predominantly ministerial position from his position as second in command to the clerk just before Bosley took office. The district court disregarded the transfer because it was done to avoid possible dismissal, and it put the person who was transferred into Thomas's old job in jeopardy of dismissal for political affiliation. Neither of these reasons persuade us that the Branti and Elrod analyses should not be applied to Thomas's case. Thomas was dismissed because of his political affiliation, even though political affiliation had no relevance to the ministerial position he held at the time Bosley took office. How Thomas got that position is irrelevant. Bosley could have dismissed him as incompetent, or lowered his salary if he thought it was too high for the position Thomas held. Bosley could not, however, dismiss Thomas for political reasons. Since that is what the district court found was

> done, Thomas must succeed in his action.

Barnes, supra at 508.

On page 11 of the petition for writ of certiorari the petitioners assert that "The District Court recognized that the replacements were "better qualified". The foregoing is neither an accurate nor a truthful rendition of the trial court's decision. The decision merely said "That defendants' replacements are arguably better qualified does not make plaintiffs unqualified." Barnes v. Bosley, 568 F.Supp. 1406, 10-11 (E.D. Mo. 1983) (emphasis added).

On page 13 of the petition for writ of certiorari by implication petitioners assert that the Eighth Circuit overturned the trial court's finding (that the plaintiffs were fired solely because of their political affiliation) and

substituted in its stead their own finding, i.e. that political affiliation was the motivating factor. That is not an accurate reading of the case. The Eighth Circuit in Barnes v. Bosley, 745 F.2d 501, 507 (8th Cir. 1984) states "that the evidence is sufficient to uphold the district court's findings." The district court finding reads as follows: "After consideration of all these factors, the Court believes plaintiffs have demonstrated that they were discharged solely for political reasons." Barnes v. Bosley, 568 F.Supp. 1406, 1410 (E.D. Mo. 1983) (emphasis added).

It follows that questions concerning the appropriateness of the application of the Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1974) "substantial or motivating factor" test which is discussed

in the Eighth Circuit opinion, Barnes v. Bosley, 745 F.2d 501, 7 (8th Cir. 1984) are not properly before this Court.

Respondents respectfully suggest that these questions are not before this Court for the reasons that: the finding of fact affirmed on appeal is that plaintiffs were fired solely because of their political affiliation; discussion of the Mount Healthy test in the Eighth Circuit's opinion was dicta. Thus, resolution of conflicts among the Circuits, if any exist concerning the application of the Mount Healthy test to politically motivated firing cases, is not properly before the Court. Respondents suggest it is not before the Court because plaintiffs were fired solely as a result of their political affiliation. Hence, it is not necessary for the Court to consider this question in order to re-

solve the instant case.

RESPONSE TO PETITIONERS' INTRODUCTION AND REASONS FOR DENYING WRIT

Petitioners, in their introduction, urge this Court to grant their Writ of Certiorari by falsely and improperly alleging the existence of a conflict between the decisions of the various circuits. The cases cited by petitioners do not sustain that proposition. On the contrary, they are in harmony with one another and support the decision of the Eighth Circuit in the instant case.

A review of the applicable law in the cases cited by petitioners follows. Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980) is a mixed-motive firing case. In that case the Fifth Circuit applied the Mount Healthy substantial

motivating factor test. Tanner, supra at 1192.

Wren v. Jones, 635 F.2d 1277 (7th Cir. 1980), is also a mixed-motive case. The court in Wren on page 1283 states in essence that the unusual facts of that case preclude a finding that political motivation was the sole basis. The Wren court applies the following test:

> Where, as in the case at bar, political association was not the sole basis for a personnel transaction, the Mt. Healthy test should be applied . . .

Wren, supra at 1286.

Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981), is also a mixed-motive case. The Nekolny court applies the Mount Healthy test on page 1168.

In Landry v. Farmer, 564 F.Supp. 598, 604 (R.I. 1983) a district court finds:

> . . . that the Mount Healthy test for proving a First Amendment violation survives Branti. Branti did not address the burden of proof question and the Court does not read it as requiring a plaintiff to prove that he was discharged solely for the reason that he was not affiliated with or sponsored by the political party in office. Branti and Elrod established that the discharge of a public, nonpolicymaking employee based solely on his political affiliations is constitutionally impermissible. Their holdings are important because they make clear that the First Amendment protects a public employee from discharge not only based on what he says, see Connick v. Myers, ___ U.S. ___, ___ ___, 103 S.Ct. 1684, 1687-93 (1983).

Bever v. Gilbertson. 724 F.2d 1083, 1089 (4th Cir. 1984), is not a mixed-motive case; thus the analysis in Wren, supra, was not applied. The Bever court simply stated that on the facts of that case the Elrod-Branti principle is clearly applicable.

The conflict among the Circuits alleged by petitioners does not exist.

The cases cited by petitioners apply the Mount Healthy standard in mixed-motive cases. Bever, the only non-mixed motive case which was cited by petitioners applied the Elrod-Branti principle. This authority is on all fours with the decision and the dicta in the case at bar. In mixed-motive cases the Mount Healthy test is applied; in solely for political motive cases, the Elrod-Branti principle is applied.

POINT I

PETITIONERS' CONTENTION THAT FIRING COMPETENT EMPLOYEES SOLELY BECAUSE OF THE MANNER IN WHICH THEY EXERCISED THEIR RIGHTS OF ASSOCIATION IS PERMISSIBLE IN CERTAIN CIRCUMSTANCES IS ENTIRELY WITHOUT MERIT.

The ultimate facts before this Court are: that plaintiffs were experienced and competent employees who were discharged solely because of their poli-

tical affiliations, and that political affiliation was not important to the positions they held. Barnes v. Bosley, 745 F.2d 501, 508 (8th Cir. 1984).

This Court in Elrod v. Burns, 427 U.S. 347 (1976), has already examined the question raised by petitioners in this point. The Court found that:

> Patronage dismissals thus are not the least restrictive alternative to achieving the contributions they may make to the democratic process. The process functions better without the practice, perhaps even better, for patronage dismissals clearly retard that process.

Elrod, supra at 169-70.

> In summary, patronage dismissals severely restrict political belief and association. Though there is a vital need for government efficiency and effectiveness, such dismissals are on balance not the least restrictive means for fostering that end.

Elrod, supra at 372.

Because of the "vital need for government efficiency and effectiveness"

the Court in Elrod, supra at 372, permitted patronage dismissals of policymaking employees. In Branti v. Finkel, 445 U.S. 507, 518 (1980), this Court abrogated the Elrod policymaking exception.

> In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

In a case such as the one at bar, petitioners can not in good faith argue, as they do on page 30 of their petition, that under either Elrod or Branti dismissals solely motivated on a basis of political association can ever constitute the least restrictive means to achieve legitimate governmental goals. This argument can not be made in good faith by petitioners because they are

precluded from doing same by the ultimate finding of fact, "that plaintiff's political affiliation was not important to the positions they held." Barnes v. Bosley, 745 F.2d 501, 508 (8th Cir. 1983) (emphasis added).

The petitioners also urge this Court to apply the Pickering v. Board of Education, 391 U.S. 563, 568 (1968), compelling state interest test to the facts of the case at bar. The rule in Pickering, though, is not applicable to the case before this Court for the reasons that: Pickering is a free speech case; the instant case hinges on a violation of freedom of association. The instant case is on all fours with the facts in Elrod and Branti which were both freedom of association cases.

The Fifth Circuit has recently surveyed the Supreme Court authority in

this area, and has concluded that:

> Elrod and Branti, we think, lie at the extreme of the employee's side, where little, if any, weighing is called for. There employees who were, it appears, both loyal and effective were discharged on the sole ground of their private and--for employment purposes -all but abstract political views. They did not campaign, they did not even speak: they merely thought. No countervailing considerations appear; they suffered discharge for pure political beliefs, a circumstance that explains the comparative absence of "weighing" terminology in these opinions.

McBee v. Jim Hogg County, 730 F.2d 1009, 1014 (5th Cir. 1984). This Court has in essence said in Elrod at 362 and in Branti at 517 that weighing is not permitted in freedom of association cases.

For all the foregoing reasons, respondents respectfully suggest that the arguments of petitioners under Point I are without merit as a matter of law.

POINT II

THE QUESTION WHETHER A DISCHARGED PUBLIC EMPLOYEE MUST PROVE THAT HE WAS FIRED SOLELY BECAUSE OF HIS POLITICAL AFFILIATION OR WHETHER PROVING THAT HIS POLITICAL AFFILIATION WAS A SUBSTANTIAL MOTIVATING FACTOR IS SUFFICIENT IS NOT BEFORE THIS COURT BECAUSE THE FINDING THAT PLAINTIFFS WERE FIRED SOLELY BECAUSE OF THEIR POLITICAL AFFILIATION IS THE ULTIMATE FINDING OF FACT WHICH IS BEFORE THIS COURT.

Petitioners' formulation of their second point presented is clearly based upon an erroneous interpretation of this Court's opinions in Elrod and Branti and of the Court of Appeals opinions which petitioners cited in Point II. In both Elrod and Branti, cases wherein plaintiffs had been discharged solely because of their political affiliation, this Court decided that a government employee can not be discharged on that basis. There is no mention of balancing in either case. Elrod formulated a policy-maker exception to the blanket prohibi-

tion. Elrod, supra at 375. Branti abrogated that exception by requiring the employer to "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Branti, supra at 517-18.

Neither case permits a balancing of the government's interest with those of the "employee who is discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs." Elrod, supra at 375 (emphasis added). In the case at bar, the ultimate finding of fact touching on this issue is that plaintiffs were competent employees who were fired solely because of their political affiliation. Thus, under the holdings in Elrod and Branti, balancing is prohibited.

The Court does not have before it a

mixed-motive case. But even if it did, the law of the cases cited by petitioners would not sustain their contention that there exists a conflict among the circuits. As previously discussed in the Response to Petitioners' Introduction, the Circuits are in harmony with one another. In mixed-motive cases they apply the Mount Healthy substantial motivating factor test.

For the foregoing reasons, the writ should be denied as to point II.

POINT III

THE BALANCING REQUIRED BY THE OPINION IN PICKERING V. BOARD OF EDUCATION, 391 U.S. 563 (1968) IS APPLICABLE PRIMARILY TO FREE SPEECH CASES. IT IS NOT APPLICABLE TO A CASE SUCH AS THIS, WHICH CONCERNS A FIRING OF PUBLIC EMPLOYEES WHICH WAS MOTIVATED SOLELY BY THE MANNER IN WHICH THE EMPLOYEES EXERCISED THEIR RIGHT OF ASSOCIATION.

The balancing required by this Court in Pickering is primarily

applicable to public employee free speech cases. Pickering and its progeny are not applicable to a case such as the one before the Court. The respondents (plaintiffs) were discharged solely because of the manner in which they chose to exercise the right of freedom of association. The instant case is on all fours with the facts in Elrod and Branti.

Elrod requires that a significant impairment of First Amendment rights must survive exacting scrutiny. Elrod, supra at 362.

Branti requires an employee's First Amendment rights to yield only where the state can show a vital interest in maintaining government effectiveness and efficiency--hardly a balancing test. Branti, supra at 517.

Neither Elrod nor Branti would

permit the balancing sought by petitioners. As was noted earlier in this brief in opposition, the Fifth Circuit has recently surveyed the Supreme Court authority in this area, and concluded that:

> Elrod and Branti, we think, lie at the extreme of the employee's side, where little, if any, weighing is called for. There employees who were, it appears, both loyal and effective were discharged on the sole ground of their private and--for employment purposes--all but abstract political views. They did not campaign, they did not even speak: they merely thought. No countervailing considerations appear; they suffered discharge for pure political beliefs, a circumstance that explains the comparative absence of "weighing" terminology in these opinions.

McBee v. Jim Hogg County, 730 F.2d 1009, 1014 (5th Cir. 1984).

For all the foregoing reasons, respondents respectfully suggest that the arguments of petitioners under Point III are without merit as a matter of law.

CONCLUSION

For all the foregoing reasons, plaintiffs-respondents respectfully submit that the judgment of the Eighth Circuit Court of Appeals, below, is entirely correct and that the same does not warrant review by this Court. For that reason it is further respectfully submitted and urged that petition for writ of certiorari in the instant case should be denied.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

The undersigned certifies that the served three copies of the foregoing on defendants-petitioners Bosley and Carter by mailing same to the office of their attorneys, Lloyd J. Jordan and Charles L. Bussey, 721 Olive, Suite 515, St. Louis, Missouri 63101, First Class Postage prepaid, on this 13th day of March, 1985.

Thomas F. Bauer